



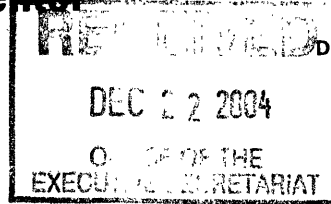
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## Western Environmental Law Center



Defending the West Land, Sky, Water, Wildlife, Culture

December 16, 2004

**VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

Phil & Nancy Douma  
d/b/a/ Philmar Dairy  
737 NM Hwy 267  
Portales, NM 88130

**Re: Sixty-day Notice of Intent to Sue for Violations of the Clean Water Act**

Dear Mr. & Mrs. Douma:

This letter is to provide you with notice of intent of Concerned Citizens for Clean Water, Inc. ADD SIERRA CLUB AND CHAPTER AND NWF (collectively "Concerned Citizens") to file a citizen suit against the Philmar Dairy (including "Philmar Dairy #1" and "Philmar Dairy #3") located 7 miles west of Portales, Roosevelt County, with a mailing address of 737 NM Hwy. 267, Portales, New Mexico, pursuant to section 505(a)(1)(a) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), 33 U.S.C. § 1365(a)(1)(A). Philmar Dairy has violated and continues to violate the CWA, EPA's CWA implementing regulations, and applicable state water pollution control laws, including but not limited to state water quality standards. You are hereby given notice that, upon expiration of the sixty (60) day statutory waiting period, Concerned Citizens will file a civil action in federal district court for violations of the CWA.

Phil and Nancy Douma are the present owners and operators of Philmar Dairy. Philmar Dairy confines over 700 dairy cows for a total of 45 days or more in any 12-month period. This facility is therefore a large Concentrated Animal Feeding Operation (CAFO) as defined under the CWA. See 40 C.F.R § 122.23..

CAFOs are "point sources" under the CWA, 33 U.S.C. § 1362(14), and are thus subject to the National Pollution Discharge Elimination System (NPDES) permit program, which prohibits the discharge of any pollutant from a point source into waters of the United States unless such discharge is permitted under an NPDES permit. 33 U.S.C. § 1311(a).

CWA Sixty-Day Notice Page 1

All CAFOs in operation prior to April 14, 2003, that contain over 700 mature dairy cows must have an NPDES permit in order to operate, 40 C.F.R. § 122.23(d), (g), and must otherwise comply with the permit. The national effluent limitations for large CAFOs prohibit any discharge from CAFO production areas except precipitation-caused discharges provided the CAFO operation is designed, constructed, operated and maintained to contain all process generated wastewater and the runoff from a 25-yr, 24-hr storm event and that the production area is operated according to specific best management practices and record-keeping requirements. 40 C.F.R. § 412.31. Philmar Dairy is not designed, maintained, constructed or operated to contain a discharge during a 25-year, 24-hour storm event so may not therefore avail itself of such an exception. Further, Philmar Dairy has discharged in other than a 25-year, 24-hour storm event. Philmar Dairy is thus required to obtain an NPDES permit but has failed to do so, and is therefore in violation of the CWA. According to EPA's Notice of Proposed Assessment of a Class I Civil Penalty, Docket No.: CWA-06-2003-171, ¶ 12, as of March 24, 2003, Philmar Dairy has "not applied for permit coverage through an individual permit or by filing a Notice of Intent (NOI) and were not covered by a NPDES permit." There has since been no public notice of any application by Philmar Dairy for an individual NPDES permit. Upon information and belief Philmar Dairy has not applied for NPDES permit coverage, is currently operating without NPDES permit coverage, and is thus in violation of the CWA.

For the land application area, the national effluent limitations for large CAFOs prohibit any discharge from any manure or process wastewater unless the discharge is the result of precipitation and the CAFO owner can document that all land application of waste conforms to nutrient management practices that ensure the beneficial use of waste through nutrient uptake by fertilized crops at agronomic rates. 40 C.F.R. § 122.23(e).

Illegal discharges and violations of the CWA include:

- (1). According to the New Mexico Environment Department's (NMED) August 15, 2000 inspection report: there are no available "irrigation records which document [land] application at below agronomic rates."
- (2). In addition, on June 21, 2002, EPA observed that Philmar Dairy improperly applied "process-generated wastewater via a 4" PVC pipe onto pasture areas devoid of vegetation which results in ponding of wastewater.
- (3). Eventually this ponded wastewater in the land application areas discharges pollutants to the storm water drainage ditches along the NM Highway 267 and the NM county road South Roosevelt Road Y, which constitute waters of the U.S." EPA's Administrative Complaint, Docket No.: CWA-06-2003-171, ¶ 16, 17.
- (4). Further, EPA observed that "storm water from the cattle pens flowed north and/or east into stormwater drainage ditches along the NM highway

267 and NM county road South Roosevelt Road Y, which constitute waters of the U.S." Id.

(5). Upon information and belief such discharge across the state highway and into adjacent ditches continued throughout the summer of 2004 and up to the present. Such land application processes violate effluent limitations and standards promulgated pursuant to 33 U.S.C. § 1314 and the CWA prohibition against CAFO discharges without an NPDES permit.

Philmar Dairy has discharged and continues to discharge pollutants including, but not limited to, liquid and solid animal wastes. Such wastes contain, among other pollutants: fecal coliform and E.coli bacteria, other pathogenic substances, phosphorous, ammonia, nitrogen, nitrates and suspended solids. Even if Philmar Dairy had NPDES permit coverage, discharges of the type that have occurred, and are likely to occur are not permitted under federal law.

In addition, Philmar Dairy is subject to national performance standards promulgated under 33 U.S.C. § 1316. As an industrial facility subject to effluent limitations for stormwater, Philmar Dairy is required to have an individual NPDES stormwater permit for stormwater discharges. Since Philmar Dairy is not designed, constructed, operated and maintained to contain the process waste and storm water in the event of a 25-year, 24-hour storm event, an industrial storm water NPDES permit is required.

Philmar Dairy entered into a settlement agreement and paid a reduced fine to the EPA for violations outlined above and in EPA's Notice of Proposed Assessment of a Class I Civil Penalty, Docket No.: CWA-06-2003-171 on July 29, 2003. However, nowhere in its correspondence with EPA does Philmar Dairy state that it has corrected the violations complained of in EPA's Complaint or alleged herein. As stated above, Concerned Citizens believe that the same or similar type violations which were the subject of EPA's enforcement action continued into the summer of 2004 and will continue into the future.

Concerned Citizens therefore believes and alleges that a history of violations, similar in type and nature to the violations listed above, and if different, all related to improper design, construction, operation and maintenance of Philmar Dairy facilities have continued and will continue into the future. Concerned Citizens therefore, believes that Philmar Dairy has discharged, and continues to discharge, pollutants into waters of the United States including ditches, draws springs, wetlands, playa lakes, streams and/or irrigation and drainage canals, all of which discharge to receiving waters of an unnamed tributary to the Boone Draw in the Brazos River minor Basin, Southern High Plains major Basin, "waters of the United States" within the meaning of 40 C.F.R. § 122.2. Some of these violations may only be known to Philmar Dairy and eyewitnesses to be determined since there is no record of any discharges having been reported by Philmar Dairy as required by law. Discovery of any additional violations may be included in future legal action by Concerned Citizens.

**The full name, address, and telephone number of the persons giving notice are:**

Concerned Citizens for Clean Water, Inc.  
P.O. Box 115  
Cloudcroft, NM 88317-0115  
(505) 687-3022

Sierra Club, Rio Grande Chapter  
1472 S. St. Francis Drive  
Santa Fe, NM 87505  
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Sierra Club  
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National Wildlife Federation  
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2260 Baseline Road, Suite 100  
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(303) 786-8001

**Attorneys representing Concerned Citizens in this notice are:**

Charles Tebbutt  
Western Environmental Law Center  
1216 Lincoln Street  
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(541) 485-2471

Courtney Brown  
Western Environmental Law Center  
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Taos, NM 87571  
(505) 751-0351

Concerned Citizens intend, at the close of the sixty (60) day notice period to file a citizen suit under Section 505 of the CWA against Philmar Dairy for the statutory maximum of \$27,500 per day for each violation stated above which has occurred since December 16, 1999, in addition to those violations which have occurred of which you are aware as well as those occurring subsequent to this letter. We intend to seek as well, injunctive and remedial relief, costs, attorney and expert witness fees, and such other relief as may be appropriate.

During the sixty (60) day notice period, Concerned Citizens will be available to discuss effective remedies and actions that might be taken to assure Philmar Dairy's future compliance with the CWA. If you wish to discuss any aspect of this notice or to discuss settlement of this matter prior to commencement of a lawsuit, please contact us.

Very truly yours,



Courtney Brown

COPIES TO:

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United States Environmental Protection Agency  
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